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C-F-100/-

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

(C.G.)

W.P. No.2503/2003

PETITIONER

Kedia Castle Dellon
Industries Ltd.
Kedia Nagar,
Kumhari-490042
District- Durg (C.G.)
With registered office at
6-B Express Towers, 42A,
Shakespeare Sarani,
Calcutta-700017

P. R. No. 2319/03
Presented by Shri Anand K. Tiwari
dated 11/8/03

VERSUS

RESPONDENTS

1. State of Chhattisgarh
through the
Principal Secretary
Department of
Commercial Taxes (Excise)
State of Chhattisgarh
D.K.S. Bhavan, Mantralaya
Raipur (Chhattisgarh)

2. Excise Commissioner
State of Chhattisgarh
Raipur (Chhattisgarh)

3. Collector
Raipur (Chhattisgarh)

4. Collector
Durg (Chhattisgarh)

11/8/03

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5. Collector
Rajnandgaon (Chhattisgarh)

6. Collector
Mahasamund (Chhattisgarh)

7. Collector
Dhamtari (Chhattisgarh)

8. Collector
Korba (Chhattisgarh)

9. Collector
Janjgir-Champa
(Chhattisgarh)

PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION ETC. AND FOR OTHER WRITS AND DIRECTIONS:

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2503 of 2003

Kedia Castle Delleon Industries Ltd.

- Versus -

State of Chhattisgarh and eight others

POST FOR ORDER ON *19th JULY, 2004*

Sd/-
L.C. Bhadoo
Judge

A. F. R.

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2503 of 2003

Kedia Castle Delleon Industries Ltd.

- Versus -

State of Chhattisgarh and eight others

Present: -

Mr. Kanak Tiwari, Advocate: For the petitioner

Mr. N.K. Agrawal, Deputy Advocate General: For the State/respondents

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Before Hon'ble Mr. L.C. Bhadoo, J.

ORDER

(Passed on 19th July, 2004)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner has questioned the legality, propriety and validity of the order/ circular dated 23.5.2001 issued by the Excise Commissioner of the State of Chhattisgarh (respondent No.2), whereby the petitioner was asked to affix holograms/stickers on the sealed bottles of country liquor supplied by him on the same terms and conditions and at the same cost fixed by the respondents, on the ground that the said order is bad in law being contrary to the tender/ license conditions. The petitioner has also challenged the order dated 1.8.2003 whereby the representation of the petitioner was rejected.

2. Brief facts leading to filing of this writ petition are that the petitioner is a public limited company duly incorporated under the provisions of the Indian Companies Act, 1956, under the certificate of incorporation. The petitioner Company is dealing and engaged in distilling/manufacturing liquor, spirit and other intoxicant liquids, which are distilled in its own distilleries. The Excise Commissioner of the erstwhile State of Madhya Pradesh had issued a notice inviting tender (NIT) on 7.3.2000 for bottling and supply of the country made spirit in sealed bottles on certain terms and conditions, which are extracted in Annexure P-2. In response to the said NIT, the petitioner quoted competitive rates for the license period commencing from 1.4.2000 to 31.3.2002 and the tender of the petitioner was accepted vide order dated 31st March, 2000. It was incorporated in the aforesaid acceptance letter of

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the respondent State that the license would be subject to statutory prescriptions contained in Madhya Pradesh (Chhattisgarh) Excise Act, 1915, and the statutory rules and other executive instructions in consonance with such statutory prescriptions read with conditions appended to the aforesaid NIT. Thereafter, the petitioner continued to supply the country liquor in sealed bottles. However, vide order/circular dated 23.5.2001, the respondent Excise Commissioner directed the petitioner through Collectors of Raipur, Durg, Rajnandgaon and Mahasamund Districts that the respondent State has decided that holograms/stickers would be affixed of a given description on the sealed bottles containing country liquor by the petitioner as a licensee in accordance with other stipulations contained in the said letter which also provided for supplies of such holograms/stickers at the rates mentioned therein of which the value/consideration would be payable through demand draft in the given excise heads. The impugned order is a colourable exercise of power through an executive fiat.

3. The further case of the petitioner is that he was not only taken aback due to the aforesaid communication, but also protested to such imposition of unwarranted pecuniary liability. The petitioner kept on making protests orally and for the first time sent a letter dated 20.11.2002, but the respondents did not make any express reply to the contents of the letter and ultimately, a legal notice was sent by the petitioner on 3.3.2003 to the respondents. In the meanwhile, the respondents again issued NIT on 5.3.2002 for the license period of 1.4.2002 to 31.3.2004 for supply of country liquor through sealed bottles in supply areas as indicated in the said NIT. Again, the petitioner submitted tender, which was accepted, vide order dated 30th March, 2002. Even in this NIT, the executive instructions dated 23.5.2001 does not find any specific mention by way of amended terms and conditions, which were merely repetition of the terms and conditions of the NIT for the period from 1.4.2000 to 31.3.2002.

4. The further case of the petitioner is that the petitioner has been subjected to coercion and un due influence against the spirit of contract by the respondents by incorporating a condition alien to the terms and stipulations of the contract merely because the respondents are in vulnerable position to dictate such unwarranted terms and conditions as the licensor due to also having monopoly of excise trade with regard to vending of country liquor either through wholesale or retail. The petitioner again sent a letter

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dated 9.7.2003 to the respondent Excise Commissioner, but to no avail. The petitioner had incurred loss to the tune of Rs.2,08,40,111/- which is recoverable from the respondents.

5. The respondent State has incorporated Chhattisgarh State Beverages Corporation for wholesale distribution and control of foreign liquor within the State. A circular has been issued by the Corporation for affixing holograms/ stickers on the sealed bottles containing foreign liquor to be supplied by the suppliers like the petitioner and the cost of such holograms/stickers is not required to be incurred by the petitioner. The petitioner is not required to incur any financial expenditure/liability thereof and the holograms/stickers are identical to be affixed on the sealed bottles containing either country liquor or foreign liquor or beer etc., except difference in colour thereof for apparent reasons. It has further been mentioned that the respondent State while transacting in business as a licensor i.e. contracting party is on the same footing with the petitioner as licensee and in such a situation no term or condition of supply of country liquor through sealed bottles between the parties can be altered by the respondents. The respondents cannot reap the harvest of their success if they on their own volition violate the terms and conditions of supply of country liquor by the petitioner even not duly warranted by law. The respondents State is prohibited from altering any terms and conditions of supply amounting to contract without knowledge or consent of the petitioner. Ultimately, it has been prayed to quash the impugned circular dated 23.5.2001 and for directions to make refund of the amount as stipulated/delineated vide chart Annexure P-13.

6. Return has been filed on behalf of the State/respondents in which it has been mentioned that on 23.5.2001 the Excise Commissioner had issued a notification for affixing of holograms on the country liquor bottles as well as on foreign liquor bottles vide Annexure P-4. The petitioner without any objection followed this notification. The said notification was issued during the period of earlier contract commencing from 1.4.2000 to 31.3.2002. Later on, it was incorporated in the Excise Policy of 2002-2003. The said notification is applicable to country liquor as well as foreign liquor and there is no discrimination on the point of incurring of expenses by the bulk suppliers to the retailers. The second period of contract commenced on 1.4.2002 and ended on 31.3.2004, i.e. for two years. On the date when the tender was submitted by the petitioner, the petitioner, who was already incurring expenses against affixing of holograms on the country liquor

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bottles, was well aware that he has to incur these expenses for the present contract also. Therefore, now at the verge of end of the contract period, he cannot challenge the manner and procedure for affixing of holograms on the country liquor bottles and the expenses incurred by him on this account. Even by the doctrine of estoppel he cannot challenge the incurring of such expenses. The said decision of the Government to affix holograms is just to identify that the liquor that is containing in a bottle has come from a valid source, and as well as to show that it is duty paid, and in order to put a check on smuggling of the liquor and to prevent smuggling of liquor from the other adjoining States.

7. It has further been mentioned in the return that the petitioner is supplier of liquor, which is distilled in his own distilleries in five districts of the State of Chhattisgarh out of 16 districts, and if the demand of five districts is satisfied by the smuggled and illicit liquor not distilled in his distillery, he is the ultimate sufferer and therefore, the hologram system is being used to protect the petitioner's interest. Therefore, the step, which is taken by the petitioner himself, the petitioner is required to incur the expenses against it. Affixing of holograms is a part of process of bottling of the country liquor under Rule 14 (xiv) (d) of the Chhattisgarh Country Spirit Rules, 1995, as well as Rule 4 (13), the Excise commissioner has ample power to give directions from time to time pertaining bottling, sealing and labeling of country liquor bottles. The Chhattisgarh State Beverage Corporation Limited is also a supplier of foreign liquor as the petitioner is of country liquor. The cost incurred for affixing of holograms on foreign liquor bottles is not incurred by the State, but by the Corporation. The trade in liquor is not a fundamental right and only license is being issued to the petitioner to be operated under the provisions of Act, Rules, Notification and also directions issued from time to time by the Excise commissioner. The petitioner is recovering Rs.2/- per bottle against the sealing charges in which price of bottling is also not included which is separately assessed and recovered from the retailers. The only expenses incurred by the petitioner for sealing of a country liquor bottling is not Rs.2/- per bottle, but it is too less. The petitioner is incurring approximately Rs.1.50 ps. per bottle against all the charges including the holograms while sealing of the bottles. It has been requested that the petition be dismissed.

8. I have heard Mr. Kanak Tiwari, counsel for the petitioner and Mr. N.K. Agrawal, Deputy Advocate General for the State/respondents.

9. Mr. Kanak Tiwari argued that as per condition No.6 (viii) of the terms and conditions of the tender dated 7th March, 2000, the petitioner was required to do bottling, labeling and sealing by pilfer proof cap of the glass bottles at the fixed rate of Rs.2.25 per piece with effect from 1.8.2000, and in these terms and conditions, affixing of holograms/stickers was not included and the petitioner was asked to affix the holograms/stickers vide impugned order/circular dated 23.5.2001. For these holograms, as per the orders of the Excise Commissioner, the petitioner is required to pay the amount and as well as he is required to incur the labour charges for affixing the holograms for which he is not being paid which is contrary to the above conditions of the tender. The Excise Commissioner was not competent to issue any notification/circular by which the petitioner can be made to incur the expenditure in violation of the terms and conditions of the tender. Learned counsel for the petitioner further argued that the expenditure which the petitioner was incurring for labeling, sealing etc., the petitioner was entitled to recover that amount from the retail distributors, whereas, as far as the hologram charges are concerned, the petitioner is incurring that expenditure and he is not entitled to recover that cost from the retailers. He further submitted that same kind of holograms are affixed on the foreign liquor bottles for which the petitioner is getting the expenditure incurred by him and whereas, the holograms which are affixed by him on the country made liquor bottles, the petitioner is not entitled to recover the amount. Therefore, this is arbitrary and violative of the terms and conditions of the tender.

10. Relying upon a decision of the Apex Court in the matter of **Verigamto Naveen vs. Govt. of A.P. and others** reported in **(2001) 8 Supreme Court Cases 344**, learned counsel for the petitioner argued that where the authority exercises the statutory powers and has exceeded its statutory power and committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, then the petitioner is entitled for the relief under Article 226 of the Constitution of India, and the respondent Excise Commissioner while issuing the order/circular dated 23.5.2001 exercised the statutory powers, therefore, the petitioner's petition for judicial review of the administrative action of the Excise Commissioner against the impugned order is maintainable. He further submitted that the petitioner is a C.S.1 license holder and as per Condition No.1 of Form C.S.1 under Chhattisgarh Country Spirit Rules, 1995, enacted under Section 62 (2) (h) of the

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Chhattisgarh Excise Act, 1915, the Excise Commissioner is authorized to exercise statutory powers or issue subsidiary orders and instructions from time to time, therefore, the Excise Commissioner has issued the orders under statutory powers, as such the petition is maintainable. Learned counsel also submitted that during the contract periods 2000-20002 and 2002-2004, the condition of affixing the holograms/stickers was not incorporated in condition No.6 (viii) of the terms and conditions of the tender, whereas for the period commencing from 1st April, 2004, to 31st March, 2006, the condition of affixing the holograms has been incorporated in the same condition. That itself shows that the petitioner was not required to affix the holograms during the previous period on his own expenses.

11. On the other hand, Mr. N.K. Agrawal, learned Deputy Advocate General argued that in the first instance as per condition No.9 of the tender notice dated 7th March, 2000, the State Government in its discretion was entitled to change the charges mentioned in condition No.6 (viii), the deposit money rates mentioned in condition No.6 (ix), and the ratio of supply in bottles mentioned in condition No.6 (x) during the current year of the contract period and the said charges shall be binding on successful tenderer/licensee. Under this, as per the Government policy, the Excise Commissioner issued the impugned order/ circular and as per Annexure R-1, the State Government issued the Excise Policy for 2002-2003. Under clause 13 of the Excise Policy, the Government decided to use holograms/stickers on the bottles for ensuring collection of excise duty and to prevent the sale of illicit liquor. He further submitted that the petitioner has already recovered the charges as per condition No.6 (viii) of the tender dated 7th March, 2000, for labeling and sealing of the bottles during the period 2000-2002 at Rs.2.25 per bottle and thereafter also. The total expenditure of the petitioner pet bottle including labeling, sealing and fixing of hologram was not exceeding Rs.1.50. Therefore, the petitioner himself accepted this order/circular and during the contract period 2000-2002 he had not raised any objection. When this particular circular was in existence, the petitioner was knowing fully well that during the period 2002-2004 also he will be required to affix the holograms and he accepted the similar terms and conditions without any objection and only for the first time, he raised objection on 20.11.2002 that is during the period commencing from 1.4.2002 to 31.3.2004, as such the petitioner is not entitled for any recovery. Therefore, if at all any point was there for the petitioner Company, it has waived its right. The learned Deputy Advocate General

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further argued that this dispute relates to the terms and conditions of the contract, as such, as per the settled law, writ petition under Article 226 of the Constitution of India, is not maintainable. Moreover, now the period is already over and as per the relief clause the petitioner has sought the relief that the respondents be directed to refund the amount realized. All such reliefs can be granted under the civil suit, not under writ jurisdiction.

12. Now, coming to the question as to whether the dispute in question relates to interpretation of terms and conditions of the contractual matter between the parties or it is a question of exercise of statutory power by a statutory authority, in this regard, settled law is that the disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. In the matter of **State of U.P. and others vs. Bridge & Roof Company (India) Ltd.** reported in **(1996) 6 Supreme Court Cases 22**, the Apex Court has held that

> "Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226.
>
> Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of the terms of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator of the civil Court, as the case may be."

13. In another case, **Kerala State Electricity Board and another vs. Kurien E. Kalathil and others** reported in **(2000) 6 Supreme Court Cases 293**, the Apex Court held that

> "The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is

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violated, ordinarily the remedy is not the writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body.

A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied."

14. Again in the matter of **National Highways Authority of India vs. Ganga Enterprises and another** reported in **(2003) 7 Supreme Court Cases 410**, the Apex Court held that "disputes relating to contracts cannot be agitated under Article 226". It is further held that whether the dispute regarding the terms of offer is a dispute concerning contractual aspect of the matter in which the writ court is not the proper forum.

15. In the light of the above decisions on the point, if we look into the facts of the present case, the petitioner's case is that affixing of holograms/stickers is not covered under condition No.6 (viii) of the terms and conditions of the tender notice dated 7th March, 2000. Therefore, the impugned order/circular of the Excise Commissioner dated 23rd May, 2001 is not within the ambit of the above clause/condition and in fact it imposes an additional burden on the petitioner. Whereas, on the other hand, the argument of the learned Deputy Advocate General is that the dispute is primarily and mainly concerned with the interpretation of the terms and conditions of the tender and therefore, it relates to the dispute regarding the contractual aspect of the matter and the impugned order/circular of the Excise Commissioner is nothing, but reiterating condition No.6 (viii) of the terms and conditions of the contract. He further argued that as per condition No.9 of the tender notice the Excise Commissioner was entitled to issue such orders. Condition No.9 of the tender notice dated 7th March, 2000, reads as under: -

> "The State Government may, at its discretion, change the charges mentioned in condition No.6 (viii) deposit money rates mentioned in condition No.6 (ix) and the ratio of supply in bottles mentioned in condition No.6 (x) during the currency of the contract period and the said changes shall be binding on successful tenderer/licensee."

Therefore, under this clause also the Excise commissioner was entitled to issue the said impugned order/circular as per the Government decision, which is mentioned in the order itself. Learned Deputy Advocate General

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further submitted that after expiry of the term the petitioner is asking for refund of the ascertained amount that can be done only through a civil suit.

16. Therefore, in view of the above contentions raised by the respective counsel, it is abundantly clear that primary and mainly this matter involves interpretation of conditions No.6 (viii) and 9 of the terms of conditions of tender notice dated 7th March, 2000, and for recovery of the ascertained amount which has already been incurred by the petitioner in affixing holograms/ stickers and it is not concerning the exercise of statutory power by the statutory authority i.e. the Excise Commissioner. As such, on this ground, the writ petition is not maintainable under Article 226 of the Constitution of India. Proper remedy for the petitioner is to approach the civil Court.

17. In the circumstances, the petition is liable to be dismissed and it is accordingly, dismissed.

Sd/-
L.C. Bhadoo
Judge

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